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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80 79-1887

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

against

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Respondent.

MOTION TO PROCEED IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI IN FORMA PAUPERIS

Pursuant to Rule 53, Paragraph I, of the Rules of this Court, motion is hereby made that the Respondent be allowed to bring her Motion in Opposition to Petition for a Writ of Certiorari in unprinted form and to proceed in forma pauperis for the reasons stated in the attached affidavit of Respondent.

JOHN KIRKLIN, Of Counsel
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AFFIDAVIT IN SUPPORT OF
MOTION TO PROCEED IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
IN UNPRINTED FORM AND
TO PROCEED IN FORMA PAUPERIS

I, ELLEN STENSON, being first duly sworn, depose and say in support of my motion to proceed in opposition to petition for a Writ of Certiorari in forma pauperis:

1. I am the Respondent in the above-entitled case.

2. My sole sources of income is $234.00 per month in Social Security benefits and a pension of $119.33 per month from my deceased husband's employer. I have no stocks, bonds, securities, real property or other valuable property.

3. Because of my poverty, I am unable to pay the costs involved in the case and still be able to provide myself with the necessities of life.

4. I believe that I am entitled to the redress I seek in said case.

5. I am represented in this action by THE LEGAL AID SOCIETY, JOAN MANGONES, Attorney-in-Charge of the Staten Island Neighborhood Office, and thus legal representation is provided to me without charge, fee or cost of any kind.

6. The nature of said case is briefly stated as follows: I commenced this action in the United States District Court for the Southern District of New York, on behalf of myself and all others similarly situated seeking a judgment declaring unconstitutional, as violative of the Fifth and Fourteenth Amendments of the Constitution of the United States and as invalid under the Social Security Act and regulations pursuant thereto:

(1) defendant's practice of automatically terminating the Medicaid benefits of Supplemental Security Income ("SSI") recipients when a determination is made that an individual is no longer eligible to receive SSI without determining the recipient's eligibility for Medicaid benefits and;

(2) defendant's practice of terminating the Medicaid coverage of SSI recipients who have been determined to be ineligible for SSI without timely and adequate notice that Medicaid is being terminated and without providing the recipient with an opportunity for a fair hearing prior to the termination of Medicaid benefits.

By judgment dated December 26, 1979 the Court held that the Commissioner of the New York State Department of Social Services violated both State and federal law by

automatically terminating the Medicaid coverage of individuals found ineligible for SSI benefits without having made an independent determination of eligibility under the Medicaid program and without providing advance notice and opportunity for a pretermination hearing on the issues of Medicaid eligibility. The Court of Appeals for the Second Circuit affirmed from the bench with an oral opinion the District Court's grant of relief requiring the State defendant to reinstate Medicaid coverage to former SSI recipients unless and until they are properly terminated from the Medicaid program.

The State defendant petitioned for a Writ of Certiorari; therefore a responsive brief must be filed on my behalf. The question on which petitioner seeks review is whether the District Court for the Southern District of New York and the Court of Appeals for the Second Circuit correctly concluded that the reinstatement of improperly withheld Medicaid coverage to former SSI recipients was permissible under the Eleventh Amendment to the Constitution of the United States and was an appropriate remedy to vindicate the adjudicated rights of the members of the plaintiff class.

7. No prior request for this relief has been made.

WHEREFORE, I request that this Court grant my Motion to Proceed in Opposition to Petition for a Writ of Certiorari as a poor person.

Ellen Stenson

Sworn to before me this
25th day of June, 1980.

Robert M. Roseman

ROBERT M. ROSEMAN
Notary Public, State of New York
No. 24-4682432
Qualified in Kings County
Commission Expires March 30, 1980

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 1980, copies of Respondent's Motion to Proceed in Opposition to Petition for A Writ of Certiorari in unprinted form and to proceed in forma pauperis and Respondent's Affidavit in Support along with Respondents' Brief in Opposition to the Petitio were mailed to Robert Abrams, Marion Buchbinder, of counsel, attorney for Petitioner Barbara Blum, 2 World Trade Center, New York, New York 10047. I further certify that all parties required to be served have been served.

JOHN KIRKLIN, Of Counsel
JOAN MANGONES, ESQ.
THE LEGAL AID SOCIETY
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Staten Island, New York 10301
(212) 273 6677

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents respectfully request that this Court deny petitioner's application that a writ of certiorari issue to review the decision of the Court of Appeals for the Second Circuit rendered on April 16, 1980 in the above-entitled case, since no novel or significant issues are raised. The question of the District Court's power to grant the challenged relief has been well settled by prior decisions of this and other courts. Further, the form of the relief granted by the District Court is merely a discretionary matter and is not of sufficient importance to warrant full consideration by this Court.

OPINIONS BELOW

The District Court for the Southern District of New York held that the Commissioner of the New York State Department of Social Services ("State defendant") violated both federal and state law by automatically terminating the Medicaid coverage of individuals found ineligible by the federal government for Supplemental Security Income (SSI) benefits without

first making an independent determination of eligibility under the Medicaid program and without providing advance notice and the opportunity for a pretermination hearing in the event of an intended termination or reduction of Medicaid coverage. The opinion of the District Court is reproduced beginning on page 3a of the State defendant's appendix, and is officially reported at 476 F.Supp. 1331.

The State defendant did not appeal from the District Court's decision that these challenged practices violated federal and state law, nor did she appeal from the Court's order that she cease terminating the Medicaid benefits of former SSI recipients without first making a separate finding of ineligibility under the Medicaid program and providing advance notice and hearing rights. She appealed only from so much of the District Court's Judgment and Orders as required her to prospectively reinstate Medicaid benefits to those individuals whose Medicaid benefits had been improperly terminated. The Final Judgment of the District Court, the Order of January 4, 1980, and the Amendment to Final Judgment and Order were omitted from respondent's brief and are reproduced beginning on page 1 of the Appendix to this brief.

The Court of Appeals for the Second Circuit affirmed, from the bench with an oral opinion, the District Court's grant of relief requiring the State defendant to reinstate Medicaid coverage to former SSI recipients unless and until they are properly terminated from the Medicaid program.

QUESTION PRESENTED

Whether the District Court and the Court of Appeals correctly concluded that prospective reinstatement of improperly withheld Medicaid coverage to former SSI recipients is permissible under the Eleventh Amendment to the Constitution of the United States and is an appropriate method of vindicating the adjudicated rights of the members of the plaintiff class.

STATEMENT OF CASE

Ellen Stenson, a 77 year-old widow suffering from severe medical disabilities and requiring the services of a housekeeper to help bathe and feed her, became eligible for medical assistance under the Medicaid[1] program when she applied and was found eligible for Supplemental Security Income benefits.[2] In July, 1978, Mrs. Stenson was notified by the Department of Health, Education and Welfare that she was ineligible for SSI benefits. Soon thereafter, her Medicaid benefits were abruptly terminated by the State and City Departments of Social Services without any notice or an opportunity for a hearing. As a result of the termination of Medicaid benefits, payments to Mrs. Stenson's housekeeper stopped and Mrs. Stenson was forced to pay $61.70 from her total monthly income of $327.00 in order to obtain prescribed medication. It is undisputed that at all relevant times Mrs. Stenson was in fact eligible for Medicaid.

In December 1978 Mrs. Stenson instituted this class action suit challenging the State defendant's policy of automatically terminating Medicaid benefits upon the termination of benefits under the SSI program without first determining whether plaintiffs continued to be eligible for Medicaid, independent of eligibility for SSI, and without providing timely and adequate notice and the opportunity for a hearing prior to any proposed termination or reduction of Medicaid benefits.

The District Court, by Opinion dated September 19, 1979, certified the plaintiff class, which was defined as:

> New York State residents who received Medicaid due to their eligibilty for SSI and whose Mediciad benefits have been terminated because of subsequent ineligibility for SSI without having received one or more of the following (a) an ex parte determination of continuing eligibility for Medicaid, independent of eligibility for SSI; (b) timely and adequate notice of such termination; (c) an opportunity for a hearing.

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1. Medicaid is a program providing medical assistance to needy individuals. It is jointly funded by the state and federal governments. 42 U.S.C. §§1396-1396k; N.Y. Social Services Law §§363-369 (McKinney 1976).

2. SSI is a federal public assistance program for needy aged, blind or disabled individuals. 42 U.S.C. §§1381-83c.

In its Opinion the District Court held that the State defendant's termination of the Medicaid coverage of individuals found ineligible for SSI without first considering the recipients' continued Medicaid eligibilty violated the Social Security Act and the regulations promulgated thereunder. 42 U.S.C. §§1396-1396k and 42 C.F.R. §§435.916(c), 435.930(b) and 435.1003. The Court also ruled that the failure of the State defendant to provide timely and adequate advance notice and the opportunity for a pretermination hearing in any case where Medicaid benefits of class members were to be terminated violated the Social Security Act, §§1396-1396k, and regulations promulgated thereunder, 42 C.F.R. §§431.202, 431.210, 431.211, 431.220(a), 431.230, as well as applicable New York State regulations. 18 NYCRR §358.8(a)(4), 358.8(c). Accordingly, the District Court enjoined defendant from withholding Medicaid benefits from class members without provision of the above procedures and required that class members whose Medicaid benefits had been improperly discontinued by the State defendant prior to the judgment of the District Court be provided with Medicaid coverage as of the date of the judgment unless and until they were found ineligible and afforded advance notice and pretermination hearing rights.

After the District Court issued its decision, plaintiffs and the State defendant submitted proposals to the court on how improperly terminated benefits might best be restored. The Court called a conference on the issue and, at the Court's request, the State defendant submitted the following proposed method of restoring benefits:

> The Department feels that the best approach would be for it to send letters to class members whose benefits had been terminated for reasons other than death or moved out of state advising them that if they are not currently in receipt of Medicaid, and have not applied and been found ineligible for Medicaid subsequent to the termination of their SSI benefits, they can have their Medicaid benefits restored as of the date of the judgment of this action by contacting their local social services district. The local district would verify both the identity of the class member and whether the class member applied for [Medicaid] and was denied subsequent to his/her SSI termination. The local district would then issue a Medicaid card.
>
> Because it appears likely that many of the letters will be returned as undeliverable, it would also be

advisable to require the local districts to publish the substance of the letter in local newspapers.

The relief granted by District Court at paragraphs 11 and 12 of its Judgment, entered on December 26, 1979, precisely tracked the State's recommendations. Thus, the State defendant was required to notify all class members except those terminated from SSI due to death, those who are currently recipients of Medicaid, and those who, subsequent to the initial termination from Medicaid, reapplied for Medicaid benefits and received notice of the denial and of their right to a fair hearing that effective the date of the judgment they would be reinstated to the Medicaid program upon request. On January 4, 1980, the Court entered an order specifying the form of the notice to be used. (Appendix, p. 11). The notice advised class members that they would be restored to Medicaid if they completed and returned an enclosed post card.[3] The notice explained that certain class members upon request could receive a Medicaid card until their cases were reviewed by the State defendant. After review, if the State defendant intended to terminate benefits, these class members would be notified of this decision and advised of their right to contest the proposed action. The notice also advised the class that such review of their cases would determine only whether they were presently eligible for Medicaid; retroactive benefits, if any, would have to be pursued through State administrative remedies.

Thereafter, the State defendant requested relief from paragraphs 11 and 12 of the Judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure and a stay of the operation of those paragraphs pending appeal. In response, the District Court modified paragraphs 11 and 12 of the Final Judgment by extending the time within which the State had to comply with their provisions, eliminating the requirement that the State research its files for current addresses of class members and eliminating the requirement that the State defendant include a self-addressed post card along with the notices to class members. The State defendant's motion was, in all other respects, denied.

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3. Plaintiffs had urged the court to require the State defendant to automatically mail a Medicaid card to each class member. When the Court adopted the State defendant's proposal that reinstatement

Footnote continued on next page

The State defendant appealed to the Court of Appeals only from that part of the District Court's Judgment and Amendment to Judgment and Order as required the State defendant to reinstate Medicaid benefits to class members whose benefits had been withheld without a determination of inelgibility and without advance notice and pretermination hearing rights.[4]

The District Court's grant of relief was affirmed from the bench by the Court of Appeals for the Second Circuit. In an unpublished oral opinion, the Court of Appeals stated that the District Court's restoration of benefits as of the date of judgment properly drew the line, for Eleventh Amendment purposes, between retrospective and prospective relief, and that under Quern v. Jordan, 440 U.S. 332 (1979), the District Court had correctly remitted class members to their state administrative remedies with regard to Medicaid reimbursement for medical expenses incurred prior to the Court's judgment. The Court of Appeals also concluded that the relief granted by the District Court represented an appropriate exercise of its equitable powers, in light of the statute's clear intention to provide continuing Medicaid coverage, the State defendant's improper discontinuance of benefits in this case, and class members continuing eligibility for benefits until they are found ineligible.[5]

THE REASONS WHY THE APPLICATION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

A. The Eleventh Amendment Permits the Relief Granted by the District Court.

The threshhold question raised is whether, under the Eleventh Amendment, the District Court possessed the power to require the prospective provision of Medicaid benefits in this case. The

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Footnote 3 continued
be on request, plaintiffs asked that a post card be used. The Court subsequently relieved the State defendant of the obligation of a post card when she expressed concern about the difficulty in complying with that part of the order.

4. The State defendant specifically stipulated that she would appeal only from paragraphs 11 and 12 of the Final Judgment. The Stipulation is reprinted at page 16 of the appendix to this brief.

5. The Court of Appeals has granted a stay pending this Court's determination on the State defendant's application for certiorari.

State defendant contends the Court of Appeals exceeded the limits of this Court's decision in Ex parte Young, 209 U.S. 123 (1908), and its progeny when it ruled that an injunction requiring, as of the date of the District Court's judgment, provision of Medicaid benefits to class members whose benefits had been illegally withheld from them until such time as a proper review of their Medicaid eligibility is completed does not run afoul of the Eleventh Amendment. The Court of Appeals' decision, however, clearly comports with the settled law of this Court concerning the proper grant of relief under the Eleventh Amendment.

As this Court's decision in Edelman v. Jordan, 415 U.S. 662, 39 L.Ed.2d 662 (1974); Milliken v. Bradley, 433 U.S. 267, 53 L.Ed.2d 745 (1977) and Quern v.Jordan,440 U.S. 332, 59 L.Ed. 2d 358 (1979) make clear, the Eleventh Amendment does not bar an award of public assistance benefits that runs forward in time from the date of judgment and requires nothing more than the payment of benefits to which plaintiffs are entitled. This is precisely the relief granted by the District Court herein, and affirmed by the Court of Appeals.

The thrust of the State defendant's argument is that the decision below improperly requires her to use state funds to pay the current medical expenses of class members regardless of whether those individuals are currently eligible for Medicaid. Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit (Petition , p. 15)(emhasis added). This argument ignores the central issue which was determined adversely to the State defendant in the District Court and from which no appeal was taken. The District Court ruled that the State defendant had illegally ceased providing Medicaid benefits, without first making appropriate determinations of ineligibility and without providing adequate notice and opportunity for a

hearing to members of the plaintiff class.[6] Until such a determination had been made, plaintiff class members remain entitled to benefits. To remedy these statutory and regulatory violations, the Court required the State defendant to continue to provide Medicaid benefits to certain class members from the date judgment was entered until (and unless) those individuals are properly determined to be ineligible for benefits. Thus, the District Court did not require continuation of Medicaid benefits regardless of Medicaid eligibility, it required continuation of benefits precisely because there has never been a valid determination of ineligibility.

Under these circumstances, the prospective payment of Medicaid benefits is plainly required "as a necessary consequence of compliance in the future with a substantive federal-question determination," Edelman v. Jordan, 415 U.S. 662, 668, 39 L.Ed.2d 662, 675-76(1974). The District Court's requirement that the State defendant pay Medicaid benefits to certain class members flows ineluctably from the substantive determinaton that the State defendant was illegally withholding such benefits from the plaintiff class.

The State defendant also takes issue with the so-called "calendar standard" (Petition, p. 14) assertedly substituted for the Ex parte Young rationale by the Court of Appeals. However, as this Court made explicit in Quern v. Jordan, 440 U.S. 332, 59 L.Ed.2d 358 (1979), the critical "distinction between that relief permissible under the doctrine of Ex parte Young and that found barred in Edelman [is] the difference between prospective relief on the one hand and retrospective relief on the other." 440 U.S. at 338, 59 L.Ed.2d at 364 (emphasis in original). The relief granted herein is clearly prospective since it operates from the date of judgment and requires payment of Medicaid benefits currently due, not benefits for which liability accrued in the past. See Milliken v. Bradley, 433 U.S. 267, 289, 53 L.Ed.2d 745,

6. The State defendant did not contest this determination in her appeal to the Court of Appeals and does not--and cannot--do so here.

761 (1977); Edelman v. Jordan, 415 U.S. 651, 663-64, 39 L.Ed.2d 662, 672-73 (1974).

The State defendant's attempt to characterize the relief granted below as "compensatory" likewise misses the mark. Current Medicaid benefits must be paid to class members to put an end to defendant's illegal withholding of benefits. Any possible compensatory purpose is implicated only by that part of the judgment concerning benefits wrongfully withheld prior to the entry of judgment, as to which plaintiffs are remitted to their state administrative remedies. With respect to this aspect of the relief, the District Court limited its order to exactly that which was approved by this Court in Quern v. Jordan, 440 U.S. 332, 59 L.Ed.2d 358 (1979).

In any event, the mere fact that a particular form of judgment may be labeled "compensatory" does not mean that it is barred by the Eleventh Amendment. Indeed, in approving a judgment requiring the state of Michigan to share the future costs of programs aimed to eliminating the effects of prior illegal practices, this Court in Milliken v. Bradley, 433 U.S. 267, 53 L.Ed.2d 745 (1977), went much further than the District Court did here. The compensatory nature of these programs did not alter the fact that they were simply part of a plan operating prospectively to remedy the effects of prior wrongs. Milliken v. Bradley, 433 U.S. at 290, 53 L.Ed.2d at 762.

In short, the linchpin of Eleventh Amendment analysis is whether the relief operates prospectively from the date of judgment, as the relief in Milliken does, or is a retroactive award of accrued liability, as was the case in Edelman v. Jordan, 415 U.S. 651, 663-64, 39 L.Ed.2d 662, 672-73 (1974). The relief granted by the District Court in the instant case falls squarely on the prospective side of this standard.

The decision of the Fourth Circuit in Kimble v. Solomon, 599 F.2d 599 (4th Cir. 1979), cert. denied sub nom. Buck v. Kimble, ____U.S.____, 62 L.Ed.2d 320 (1979), is not, as asserted by petitioner, inconsistent with the result reached in the instant case. In Kimble, the State defendant terminated certain

services that had been available to Medicaid recipients without providing the timely and adequate advance notice that is required by the same federal regulations that were in issue below. Upon plaintiffs' challenge to this practice, the District Court ruled that those services must be restored to the affected individuals pending provision of the appropriate procedural safeguards. In the face of an Eleventh Amendment challenge, the Fourth Circuit affirmed the major portion of this relief. In so doing, the Court stated: "[w]e think that the Eleventh Amendment permits an order requiring the prospective restoration of [Medicaid] benefits" that had been wrongfully withheld from members of the plaintiff class. 599 F.2d at 601. The Court reasoned that such relief requires payment only for medical services received after entry of judgment and thus "would hardly constitute 'the award of an accrued monetary liability.'" 599 F.2d at 605, quoting Milliken v. Bradley, 433 U.S. 267, 289, 53 L.Ed.2d 745, 761 (1977) and Edelman v. Jordan, 415 U.S. 651, 663-64, 39 L.Ed.2d 662, 672-673 (1974). This aspect of the Fourth Circuit's decision is fully consistent with the decision of the Second Circuit below.

Petitioner argues, however, that this holding is undercut by the Court's statement that individuals who had been validly determined to be ineligible for all Medicaid benefits after the improper reductions took effect but before entry of judgment were not entitled to restoration of benefits. As is readily apparent, this aspect of Kimble is distinguishable from the instant case. In Kimble, where there was a sufficient reason for withholding Medicaid benefits, independent of the illegal reductions themselves, restoration was inappropriate. Indeed it would have been anomalous for the Kimble court to require reinstatement of the curtailed Medicaid services to individuals who subsequently had been found, through valid procedures, to be ineligible for any Medicaid benefits. However, eligibility for Medicaid, the issue that was independent of the illegality corrected by the Kimble court, is the central issue here. Petitioner has failed to do what was found dispositive

in Kimble--she has failed to render valid determinations that class members' eligibility for Medicaid has ceased. In fact, the judgment from which petitioner appeals excludes from reinstatement class members who have been the subject of intervening determinations of ineligibility for benefits, as in Kimble. See Amendment to Judgment and Notice, February 20, 1980, Appendix p. 13 . Thus, the decision in Kimble is fully congruent with the decision challenged here.[6]

B. The Relief Granted by the District Court was a Proper Exercise of the Court's Equity Powers.

Having the power to enter a remedial order requiring the prospective reinstatement of Medicaid benefits, the District Court's exercise of that power was a discretionary act that raises no issues of significance. Furthermore, it is clear that the grant of relief was an appropriate exercise of the District Court's traditionally broad discretionary powers to fashion a remedy sufficient to correct the federal violation found by the Court. See Milliken v. Bradley, 433 U.S. 267, 288, 53 L.Ed.2d 745, 761 (1977); Lemon v. Kurtzman, 411 U.S. 192, 36 L.Ed.2d 151 (1973); Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 28 L.Ed.2d 554 (1971); International Salt Co. v. United States, 332 U.S. 392, 400, 92 L.Ed2d 28 (1947); U.S. v. Crescent Amusement, 323 U.S. 173, 185, 89 L.Ed. 160, 169 (1944); Seibert v. Sperry Rand Corp., 586 F.2d 949 (2nd Cir. 1978); Local 53 of Int. Ass'n of Heat and Frost I and A Wkrs. v. Vogler, 407 F.2d 1047, 1052 (5th Cir. 1969). The prospective restoration of Medicaid coverage ordered by the District Court constitutes the only effective means available to vindicate the adjudicated rights of the plaintiff class and is consistent with that implemented by other federal courts considering similar violations of the Social Security Act. Eder v. Beal, 609 F.2d 695 (3rd Cir. 1979); Kimble v. Solomon,599 F.2d 599 (4th Cir. 1979), cert. den sub. nom, Buck v. Kimble, ___U.S.___62 L.Ed.2d 320 (1979); White v. Roughton, 530 F.2d 750 (7th Cir. 1976) 508 F.2d 485 (7th Cir. 1974 cert. den. 420 U.S. 1008 (1975); Turner v. Walsh, 435 F.Supp. 707 (W.D. Mor. 1977); Viverito v. Smith, 475 F. Supp. 1122, 1133-34 (S.D.N.Y. 1979)(Appendix p18)

6.The decision of other Circuit Courts are also in accord with that of the Second Circuit in the instant case,

 Footnote continued on next page

At the same time, the relief was specifically tailored to minimize the burden on the State defendant.

The State defendant did not appeal from the District Court's holding that the Social Security Act requires that, once Medicaid benefits have been provided to an SSI recipient, those benefits cannot be discontinued unless and until the individual is found ineligible under the Medicaid program and is provided with advance notice of that determination and the opportunity for a pretermination hearing. That ruling correctly concluded that applicable federal regulations, in implementing the Social Security Act, require that Medicaid benefits of persons found to be eligible for them must be continued without interruption until those persons are properly determined to be ineligible for those benefits. 42 U.S.C. §1396(a)(3) and (8); 42 C.F.R. §435.930(b); 42 C.F.R. §435.1003; 42 C.F.R. §§431.202, .210, .211, .220(a)(2); Goldberg v. Kelly, 397 U.S. 254 (1970); Kimble v. Solomon, 599 F.2d 599 (4th Cir.), cert. den. sub. nom Buck v. Kimble, ____U.S.____, 62 L.Ed.2d 320 (1979); Eder v. Beal, 609 F.2d 695 (3rd Cir. 1979); Brown v. Weinberger, 382 F.Supp. 1092, 1099 (D. Md. 1974), aff'd mem, 529 F.2d 514 (4th Cir. 1975); Viverito v. Smith, 474 F.Supp. 1122, 1133-34 (S.D.N.Y. 1979); Brown v. Wolgemuth, 371 F.Supp. 1035, 1039 (W.D.Pa. 1974), aff'd 492 F.2d 1238 (3rd Cir. 1974).[7]

Footnote 6 continued
See Eder v. Beal, 609 F.2d 695, 698, 701 n.3 (3rd Cir. 1979); Vargas v. Trainor, 509 F.2d 485, 490-91 (7th Cir. 1974), cert. denied, 420 U.S. 1008 (1975); Turner v. Walsh, 435 F.Supp. 707 (W.D. Miss. 1977), aff'd, 574 F.2d 456 (8th Cir. 1978).

7. Contrary to the argument made by the State defendant (Petition, p. 12), the Secretary of Health, Education and Welfare, throughout the course of the litigation in the District Court, agreed with plaintiffs' position that the Medicaid regulations require the State defendant to continue to provide Medicaid benefits to former SSI recipients until the State defendant has made a determination of ineligibility and has given advance notice and prior opportunity for a hearing. Secretary's Brief in Support Of Motion for Judgment on the Pleadings, pp. 22, 23, 25. The paragraph cited by the State defendant contained the Secretary's comments as to the basis on which the State defendant may determine continued eligibility once SSI benefits have been terminated. The Secretary states that "where a former SSI recipient has not filed an application under the State's "medically needy" plan and there is no other basis to support a finding of continued eligibility" a state may decide to terminate benefits (emphasis added). The

Footnote continued on next page

In granting the challenged relief, the District Court had before it the State defendant's data on the present Medicaid status of class members. The Court had to design relief to meet the needs of a class composed mainly of aged, blind and disabled individuals living on the edge of poverty. The State defendant claimed before the District Court, as she does before this Court, that class members who needed Medicaid reapplied for it. This claim was unsubstantiated before the District Court and is unsubstantiated now. This particularly vulnerable class of individuals, with very special needs and limitations, may very well have lacked the ability, tenacity and skepticism to pursue Medicaid coverage after a governmental agency withdrew those benefits. See Vargas v. Trainor, 508 F.2d 485 (7th Cir. 1974); cert. den. 420 U.S. 1008 (1975); Blum v. Caldwell, No. A-946 (Mr. Justice Marshall, Circuit Justice, May 6, 1980).[8]

Futher, at State defendant's urging the District Court limited the class entitled to notice so as to exclude any person who applied for Medicaid after benefits had initially been withheld and had been found ineligible for benefits. In reponse to the petitioner's argument as to administrative cost and inconvenience, the District Court did not provide for automatic reinstatement to the program, but rather provided notice whereby the burden was placed on the class members to request restoration. The Court also relieved petitioner of any requirement that she obtain current addresses of class members. On the same basis, the Court eliminated the requirement that the petitioner send class members a post card by which they could readily request benefits. In each instance the District Court modified its decree to accommodate the State defendant's expressed concerns.

Footnote 7 continued
District Court held that in the case of former SSI recipients, the State defendant first had to consider whether there is another basis of eligibility for Medicaid, independent of SSI eligibility, and make an ex parte determination on that issue, prior to instituting action to terminate benefits. Appendix to Petition, pp. 16a-17a; Appendix to this brief, pp. 2-3, 7 .

8. Furthermore, the State defendant's argument that class members can reapply for benefits would deny them the very rights

Footnote continued on next page

The accommodation of the competing interests reached by the District Court herein reflects the sound exercise of its discretion. To hold otherwise would mean that a court could never vindicate the Goldberg v. Kelly rights of public assistance recipients, as it would be deprived of the only effective remedy for illegal termination of assistance - reinstatement of benefits from the date of judgment until the law is complied with.

CONCLUSION

Petitioner has not isolated any factors that render this case of particular importance or significance. The decision below is in line with the prior decisions of this Court, as well as the decisions of all other Courts of Appeals to confront the issue. Nor is any other basis to review the District Court's exercise of its discretion in granting the challenged relief presented. For these reasons, the State defendant's application for a writ of certiorari should be denied.

Footnote 8 continued
adjudicated by the District Court and the procedural protections that recipients of governmental welfare benefits need to guard against arbitrary governmental action. Goldberg v. Kelly, 397 U.S. 254, 25 L.Ed.2d 287 (1970).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Plaintiff,

vs.

78 Civ. 6044 (RWS)
FINAL JUDGMENT

BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services, STANLEY BREZENOFF, individually and in his capacity as Commissioner of the New York City Department of Social Services, and JOSEPH CALIFANO, JR., individually and in his capacity as Secretary of Health, Education and Welfare of the United States,

Defendants.

This case having come before the Court on plaintiff Ellen Stenson's motion for class certification and summary judgment, the motions of Barbara Blum (the State defendant) and Joseph Califano, Jr. (the Federal defendant) for summary judgment, the motion of Stanley Brezenoff (the City defendant) to dismiss, and the motions of Michael Murtagh and Dorothy Wilson to intervene as plaintiffs; and an opinion having been rendered on September 18, 1979, granting plaintiff's motion for class certification, granting in part and denying in part plaintiff's motion for summary judgment, granting in part and denying in part the State defendant's motion for summary judgment, granting the motions of the Federal defendant for summary judgment and of the City defendant to dismiss, and denying the motions of Michael Murtagh and Dorothy Wilson to intervene as plaintiffs, it is hereby

ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff's motion for class certification pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure is granted, the class to be composed of all New York State residents who received Medicaid due to their eligibility for Supplemental Security Income ("SSI") and subsequently suffered a termination, reduction or suspension of Medicaid benefits because of subsequent ineligibility for SSI without their having received the following: (a) an ex parte determination of continued eligibility for Medicaid, independent of eligibility for SSI; (b) timely and adequate notice of such termination, reduction or suspension; (c) an opportunity for a hearing.

2. Plaintiff's motion for summary judgment is granted in part and denied in part; the Federal and City defendants' motions are granted in whole; the State defendant's motion for summary judgment is denied in part and granted in part.

3. The motions of Michael Murtagh and Dorothy Wilson for intervention are denied.

4. The complaint is dismissed against the Federal and City defendants.

5. Plaintiff Ellen Stenson's claim for money damages against the State defendant is denied.

6. As used in this Judgment

(a) the term "Medicaid benefits" refers to benefits and services provided pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396i;

(b) the term "Supplemental Security Income benefits" (or "SSI")refers to benefits provided pursuant to Title XVI of the Social Security Act, 42 U.S.C. §§1331-1383c;

(c) the term "ex parte determination" refers to a determination of continued eligibility for Medicaid bene-

fits, at which the former SSI recipient need not be present, based on the information provided to the State by the Secretary of the Department of Health, Education and Welfare, on information which the State possesses concerning the eligibility of the former SSI recipient for any form of State public assistance, and on any additional information which the former SSI recipient provides in a timely manner at the request of the State defendant, prior to the terminating, reducing or suspending of Medicaid benefits.

(d) the phrase "termination, reduction or suspension of Medicaid benefits" includes any action or proposed action that will result in terminating, reducing or suspending Medicaid benefits or reducing or discontinuing services received under the Medicaid program.

(e) the phrase "timely and adequate notice" means the notice required by 42 C.F.R. §§431.210-431.214;

(f) the phrase "evidentiary hearing" means the hearing described by 42 C.F.R. §§431.201, 431.240, 431.241, 431.242, 431.243, 431.244, and 431.245;

(g) the phrase "timely requested evidentiary hearing" means an evidentiary hearing requested within the time limits prescribed by 42 C.F.R. §§431.221, 431.230, 431.231 and 18 N.Y.C.R.R. §358.5(a).

7. The State defendant's failure to make an ex parte determination of an individual's continued Medicaid eligibility independent of eligibility for SSI, after notification by the Federal government that an individual is no longer eligible for SSI, violates Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396i, and 42 C.F.R. §435.916(c), 435.930(b) and 435.1003.

8. The State defendant's failure to send to former SSI recipients timely and adequate notice of intent to effect termination, reduction or suspension of Medicaid benefits violates Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396i, and 42 C.F.R. §§431.202, 431.210 and 431.211, as well as the applicable New York State regulations, specifically 18 N.Y.C.R.R. §358.8(a).

9. The State defendant's failure to provide former SSI recipients with an opportunity for an evidentiary hearing violates Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396i and 42 C.F.R. §§431.220(a), 431.230, as well as applicable New York State regulations, specifically 18 N.Y.C.R.R. §§358.4(a)(4), 358.8(c).

10. The State defendant's termination, reduction or suspension of Medicaid benefits of a former SSI recipient following notification from the Federal government that such recipient's SSI benefits have been terminated or suspended, without according that individual,

(a) an ex parte determination of continued eligibility for Medicaid benefits, independent of eligibility for SSI benefits;

(b) timely and adequate notice of such reduction, termination, or suspension of Medicaid benefits; and

(c) an evidentiary hearing if such hearing is timely requested

violates Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396i, the regulations promulgated thereunder, specifically 42 C.F.R. §§431.210, 431.211, 431.220(a)(2), 431.230, 435.916(c) and 435.930(b), and the applicable New York State regulations, specifically 18 N.Y.C.R.R. §§358.4(a)(4) and 358.8(a), (c).

11. Within 60 days from the entry of this Judgment, the State defendant shall send a notice to all members of the plaintiff class except the following individuals:

(a) individuals who were terminated from Medicaid due to death;

(b) individuals who are currently recipients of Medicaid benefits; and

(c) individuals who have, subsequent to the initial termination from Medicaid, reapplied for Medicaid benefits and received notice of the denial of Medicaid benefits and of their right to a fair hearing.

The notice shall inform class members that their Medicaid benefits will be restored, at their request, effective as of the entry date of this Judgment. The notice shall further inform the class members that no further relief is available from their Federal action, and that retroactive benefits, to the extent that such benefits are available, must be sought through State administrative procedures.

In those local districts of the State in which no centralized records are maintained of recipients of public assistance, the State shall mail the notice to the most recent recorded address of each class member entitled to receive notice. In those local districts of the State in which centralized records are maintained of recipients of public assistance, the State shall search such records to determine the most recent recorded address of each class member and shall mail notice to the most recent address available to the State defendant.

The State defendant shall also publish the substance of the notice in local newspapers at least twice during the week of February 3, 1980.

12. The State defendant shall restore Medicaid benefits, as of the date of this judgment, to all persons who request such restoration in response to the notice sent pursuant to paragraph 11 of this Judgment. The State defendant shall mail Medicaid cards to class members within 30 days after a request for restoration of benefits is received by the State defendant. The State defendant shall continue to provide Medicaid benefits to those individuals until such time as the State defendant:

(a) make an ex parte determination of the continued Medicaid eligibility of that individual;

(b) provides timely and adequate notice of any proposed reduction, termination or suspension of Medicaid benefits;

(c) provides that individual with an evidentiary hearing, if such hearing is timely requested; and

(d) renders a decision after a hearing requested within the period prescribed by 42 C.F.R. §431.230 and 18 N.Y.C.R.R. §358.8.

13. The State defendant may discontinue Medicaid benefits to any individual whose benefits have been restored and then terminated in accordance with paragraph 12 of this Judgment, if that individual fails to request an evidentiary hearing within ten days of the mailing of notice of termination. However, the State defendant will provide an evidentiary hearing to such individual if a hearing is requested within 60 days from the date that the State defendant's timely and adequate notice is mailed, pursuant to 18 N.Y.C.R.R. §358.5 and 42 C.F.R. §431.221(d).

14. The State defendant is hereby enjoined from a termination, reduction or suspension of Medicaid benefits of any individual after the Federal government has notified the State that such individual's SSI benefits have been reduced, terminated or suspended without:

(a) conducting an ex parte determination of that individual's Medicaid eligibility, independent of such individual's eligibility for SSI;

(b) providing that individual with timely and adequate notice of intent to reduce, suspend or terminate Medicaid benefits;

(c) according to those individuals notified of a proposed termination, reduction or suspension of Medicaid benefits an opportunity for an evidentiary hearing, if such hearing is timely requested; and

(d) rendering a decision after a timely requested hearing,

as required by Title XIX of the Social Security Act, 42 U.S.C. §§1396-1396i, and the regulations promulgated thereunder, specifically 42 C.F.R. §§431.210, 431.211, 431.220(a)(2) and 431.230, and as further required by applicable New York State regulations, 18 N.Y.C.R.R. §§358.4(a)(4) and 358.8.

15. The plaintiffs shall recover the costs, expenses, and disbursements of this action, together with reasonable attorney's fees, pursuant to 42 U.S.C. §1988, in an amount to be determined by the Court upon timely application by the plaintiff.

16. The terms of this judgment shall bind the State defendant and her successors in office, their officers, agents, servants, employees and attorneys, and those persons in active

concert or participation with them who receive actual notice of this judgment by personal service or otherwise. The performance by the Federal defendant of its functions under Title XIX of the Social Security Act shall not in itself be construed as placing the Federal defendant in active concert or participation the State defendant. Nothing in this Order and Judgment shall be construed to entitle the State defendant to Federal Medicaid reimbursement beyond that available under the relevant statutory and regulatory provisions.

17. This Court retains jurisdiction over this action for the purpose of issuing any orders which may be necessary for the construction, implementation or enforcement of this Judgment or of any of the provisions thereof, including approval of the notice to be sent to class members, such notice to be submitted on notice on or before December 28, 1979.

IT IS SO ORDERED:

Robert W. Sweet
U.S.D.J.

Dated: New York, New York
December , 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELLEN STENSON, individually and on behalf of all other persons similarly situated,	
Plaintiff,	78 Civ. 6044 (RWS)
vs.	ORDER
BARBARA BLUM, individually and in her capacity as Commissioner of the New York State Department of Social Services, et alia,	
Defendants.	

IT IS HEREBY ORDERED that the notice to be sent by the State defendant in accordance with paragraphs 11 and 17 of the Final Judgment entered in this action on December 20, 1979 shall be as follows:

MEDICAID NOTICE

Dear Sir or Madam:

YOU WILL BE RESTORED TO MEDICAID IF YOU COMPLETE AND RETURN THE ENCLOSED POSTCARD.

As a result of a court decision you now have a right to a Medicaid card. You are one of the class members in that case because your Medicaid benefits were stopped when you were cut of S.S.I. without notice or a hearing.

When you lost your S.S.I. benefits you should have continued to receive Medicaid until your case was reviewed to see whether you were still eligible for Medicaid. Since this was not done, you have a right to Medicaid until we have completed a review of your case. To get a Medicaid card you need only complete and return the enclosed, self-addressed card.

We will then send you a Medicaid card until after review of your case is completed. After the review, we will tell you if we intend to reduce or stop your Medicaid. At

that time, you will be told of your right to contest any decision to stop or reduce your Medicaid. Our review of your case will determine only if you are now eligible for Medicaid.

These are the only benefits available under this court action. Any other retroactive benefits, to the extent that such benefits are available, must be sought through State administrative procedures.

Dated: New York, New York
January 4, 1980

Robert W. Sweet
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Plaintiff,

vs.

BARBARA BLUM, individually and in her capacity as Commissioner of New York State Department of Social Services, STANLEY BREZENOFF, individually and in his capacity as Commissioner of the New York City Department of Social Services, and JOSEPH CALIFANO, JR., individually and in his capacity as Secretary of Health, Education and Welfare of the United States

Defendants.

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78 Civ. 6044 (RWS)
AMENDMENT TO JUDGMENT AND ORDER

Upon the motion of the State defendant for relief from the final judgment of this court entered on December 20, 1979 and for an amendment to the form of notice approved by this court on January 4, 1980, it is hereby

ORDERED that paragraphs 11 and 12 of the final judgment are amended to read as follows:

11. On or before April 18, 1980, the State defendant shall send a notice to all members of the plaintiff class who were terminated from SSI for a reason other than death, advising them that, subject to the exception set forth in paragraph 12 of this judgment, their Medicaid benefits will be restored, at their request, effective as of the entry date of this judgment. The notice shall be mailed to the most recent address available to the State defendant. The notice shall further inform class members that no further relief is available from their Federal action, and that retroactive benefits, to the extent that such benefits are available, must be sought through State administrative procedures.

The State defendant shall also publish the substance of the notice in local newspapers at least twice during the week of April 13, 1980.

12. Subject to the exception set forth below, the State defendant shall restore Medicaid benefits, as of the date of this judgment, to all persons who request such restoration in response to the notice sent pursuant to paragraph 11 of this judgment. The State defendant shall not restore Medicaid benefits to those class members who, subsequent to the initial termination from Medicaid, reapplied for and were denied Medicaid benefits, and received a notice advising them of their right to a fair hearing to contest such denial.

The State defendant shall mail Medicaid cards to class members within 30 days after a request for restoration of benefits is received by the State defendant, and shall continue to provide Medicaid benefits until such time as the State defendant:

(a) makes an ex parte determination of the continued Medicaid eligibility of that individual;

(b) provides timely and adequate notice of any proposed reduction, termination or suspension of Meidcaid benefits;

(c) provides that individual with an evidentiary hearing, if such hearing is timely requested; and

(d) renders a decision after a hearing requested within the period prescribed by 42 C.F.R. section 431.230 and 18 N.Y.C.R.R. section 358.8.

It is further ORDERED that the notice required to be sent by the State defendant in accordance with paragraph 11 of the Final Judgment and the January 4, 1980 order of this court shall be amended to include the following language which shall be placed at the end of the notice:

PLEASE DISREGARD THIS NOTICE IF

1) YOU ARE CURRENTLY RECEIVING MEDICAID, or

2) SUBSEQUENT TO THE TERMINATION OF YOUR SSI BENEFITS YOU REAPPLIED FOR AND WERE DENIED MEDICAID BENEFITS, AND RECEIVED A NOTICE ADVISING YOU OF YOUR RIGHT TO A HEARING TO CONTEST THAT DENIAL.

It is further ORDERED that the requirement that the State defendant enclose a self-addressed envelope with the notice is hereby deleted.

It is further ORDERED that all further relief sought by the State defendant in accordance with the procedure set forth in Evans v. United Lines Company, 303 F.2d 430 (2d Cir. 1962), including the motion for a stay pending appeal, is denied.

IT IS SO ORDERED:

Robert W. Sweet
U.S.D.J.

Dated: New York, New York
February 7, 1980

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

ELLEN STENSON, individually and on behalf of all other persons similarly situated,

Plaintiff-Appellant,

-v-

Docket No. 80-6047

PATRICIA HARRIS, individually and as Secretary of Health, Education and Welfare of the United States,

Defendant-Appellee.

----------X

The undersigned attorneys for the respective parties hereby stipulate that:

1. Barbara Blum, the appellant in Stenson v. Blum, Docket No. 80-7119, hereby withdraws, without costs or attorneys fees and with prejudice, her appeal in that action only insofar as such appeal was taken from paragraphs 7, 8, 9, 10 and 14 of the judgment entered therein.

2. Based upon the above action of appellant Blum, ELLEN STENSON, individually and on behalf of all other persons similarly situated, withdraws, without costs or attorneys fees

and with prejudice, her appeal in Stenson v. Harris, Docket No. 80-6047.

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Attorneys for PATRICIA HARRIS

by Thomas Warren
THOMAS WARREN

SO ORDERED:

March , 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARSHA VIVERITO, individually and on behalf of her minor children ADAM and JASON, and on behalf of all others similarly situated,	:	
Plaintiffs,	:	CIVIL ACTION NO. 76 Civ. 4151 (MEL)
and	:	
MARGARITA FRANCISCOVITCH, individually and on behalf of her minor child LINDA; WILLIAM BANNISTER; and JOANNE AGOGLIA, individually and on behalf of her minor children DESIREE and CHRISTOPHER, and on behalf of all others similarly situated,	:	JUDGMENT AND ORDER
Plaintiff-Intervenors,	:	
-against-	:	
J. HENRY SMITH, individually and as Commissioner of the New York City Department of Social Services, and PHILIP L. TOIA, individually and as Commissioner of the New York State Department of Social Services,	:	
Defendants.	:	

Plaintiff Marsha Viverito having commenced the above entitled action on behalf of herself, her minor children and all others similarly situated, and plaintiffs Margarita Franciscovitch, William Bannister, and Joanne Agoglia having intervened, and the defendants having answered, and on October 26, 1976 the court having certified a class and granted a preliminary injunction, and plaintiffs having moved for summary judgment and a permanent

injunction, and a trial having been held, and plaintiffs having renewed their request for relief either in the form of summary judgment or judgment after trial, and the court having rendered an opinion dated July 6, 1979, containing its findings of fact and conclusions of law, it is hereby

ORDERED, ADJUDGED and DECREED (1) that defendants' actions and so much of 18 N.Y.C.R.R. §358.8(c)(1) as permits defendants' actions of (a) terminating, suspending or reducing shelter allowances of public assistance recipients prior to the holding of a timely requested fair hearing or the issuance of a fair hearing decision, and (b) failing to give recipients written notice that if they timely request a fair hearing their aid will automatically be continued either until the fair hearing is held or until the fair hearing decision is rendered, are invalid; and it is further

ORDERED and ADJUDGED (2) that defendants, their officers, agents, employees, successors and all persons in active concert and participation with them be and hereby are permanently enjoined from terminating, suspending, or reducing the shelter allowances of public assistance recipients, or continuing to pay reduced ~~reduce the~~ shelter allowances of those whose allowances were reduced pursuant to the 1976 amendment to the shelter allowance regulations, either pursuant to 18 N.Y.C.R.R. §358.8(c)(1) or otherwise, (a) prior to the holding of a timely requested fair hearing or the issuance of a fair hearing

decision, and (b) without first giving recipients written notice that if they timely request a fair hearing their aid will be continued either until the fair hearing is held or until the fair hearing decision is rendered and it is further

ORDERED (3) that the issue of plaintiffs' entitlement to costs, disbursements and attorneys' fees herein be and hereby is reserved for later determination by this court upon appropriate motion.

Dated: New York, New York
July September 27, 1979

/s/ Morris E. Lasker
UNITED STATES DISTRICT JUDGE